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No. 84-223

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

TRIPLE "A" MACHINE SHOP, INC.,
Petitioner,

vs.

SOUTHWEST MARINE, INC.,
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATEMENT OF THE CASE

A uniquely large drydock facility (the "Graving Dock") was leased by the United States Navy to the San Diego Unified Port District (the "Port"). The Port entered into an operating agreement (the "Users' Agreement") with Triple "A" Machine Shop, Inc. ("Triple") and other ship repair companies located in San Diego.

The Users' Agreement provided for the operations and maintenance of the Graving Dock and assessed certain charges for the use of the facility. If the operations produced a net profit, such profit would be distributed pro rata among the commercial users.

This Users' Agreement restricted the use of the Graving Dock to the original commercial users and new users which, upon application to the Port, were able to meet requirements of Sections 32(b) and (c) of the Users' Agreement applicable only to prospective new users. These sections required (1) twenty four months of ship repair experience, (2) the capability to perform all of the work generally done in the Graving Dock without resort to subcontractors and (3) a net worth of five million dollars or the posting of a performance bond in that amount.

The president of Southwest was at all relevant times one Arthur E. Engel. At the time the Users' Agreement was executed, Arthur Engel was the general manager of Triple "A" South, the San Diego operating division of Triple. Within the course and scope of this employment and with the express consent of his employer, Arthur Engel executed the Users' Agreement in June of 1976 on behalf of Triple. (Tr. Vol. III 339)

Defendant National Steel and Shipbuilding Company ("NASSCO") admitted initiating the substantive requirements of Sections 32(b) and (c). (Tr. Vol. VIII 1093-1094) This admission was confirmed by the Port. (Tr. Vol. IX 1252) NASSCO's Vice President explained that he reviewed his concept with Arthur Engel, but it was not a lengthy conversation in which Engel was bringing up his own suggestions. (Tr. Vol. II 193)

Respondent Southwest Marine, as a corporate entity, was not at all involved in the formation of the Users' Agreement.

In July of 1976 Arthur Engel left the employment of Triple. He formed his own competitive ship repair company, Southwest, in August of 1976. From humble beginnings, Southwest quickly grew to an employer of several

hundred with annual sales of several million dollars, concentrating on the repair of ships for the United States Navy.

In spite of this commercial success, Southwest was foreclosed from one major market. Certain repair contracts for the United States Navy, due to the size of the ship and the Navy's "home port" repair policy, required the utilization of the San Diego Graving Dock. Although any holder of a Navy-issued Master Ship Repair Contract could bid on such repair contracts, any low bidder would be required to demonstrate that it had access to the San Diego Graving Dock as part of a pre-award survey.

In early 1977, Southwest contemplated bidding on certain Navy repair contracts requiring the use of the Graving Dock. As Southwest was not a user company under the Users' Agreement, it proposed to perform the repairs itself by subcontracting the actual docking and undocking to a user company. To this end, Southwest requested bids from NASSCO, Triple and the other users. Each refused to bid as a subcontractor providing such docking services.

In June of 1977, Southwest made application to the Port to become an additional user company. Although Southwest personnel had both considerable experience in the ship repair industry and the ability to post five million dollars in liability insurance, it could not meet the precise requirements of Sections 32(b) and (c) as interpreted and enforced by NASSCO, Campbell Industries and Triple.

The Port took the position that the Users' Agreement was a contract, not a regulatory ordinance of the Port, and could not be modified without the consent of all parties. (Tr. Vol. VIII 1094-1095) Triple and the other users refused to modify or expansively interpret the requirements of Sections 32(b) and (c), and affirmatively enforced these restrictive provisions with the effect of excluding Southwest

from competing for those Naval repair contracts requiring the use of the Graving Dock.

Neither Southwest Marine nor Arthur Engel participated in the interpretation or enforcement of Sections 32(b) and (c). (Tr. Vol. VIII 1097)

At a June, 1977 hearing, Triple A objected to any amendment or interpretation which would permit Southwest Marine to have access to the Graving Dock. (Tr. Vol. X 1373, Vol. III 399-400)

PROCEDURAL HISTORY OF THE ACTION

Southwest Marine initiated this action in February of 1978.

Respondent's early motion for a preliminary injunction barring enforcement of Sections 32(b) and (c) was denied. Respondents' motion to strike *Parker v. Brown* and *Noerr-Pennington* defenses asserted in defendants' answers was granted. *Parker v. Brown,* 317 U.S. 341, 63 S. Ct. 307 (1943), *Eastern RR Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 81 S. Ct. 523 (1961), *United Mine Workers of America v. Pennington,* 381 U.S. 657, 85 S. Ct. 1585 (1965).

The jury, in special verdict, found the experience and financial requirements as set forth in the Users' Agreement to be unreasonable under Section 1 of the Sherman Act, and further found these requirements to have unreasonably restrained interstate trade or commerce and to have been the proximate cause of damage to Southwest Marine. (Tr. Vol. XIV 11) These portions of the verdict are not the subject of the petition for writ.

The jury further found Arthur Engel to be *in pari delicto* with the defendants in an unreasonable restraint of trade or commerce and found Arthur Engel to be the alter ego of Southwest Marine. (Tr. Vol. XIV 12)

It is this finding of *in pari delicto* which is the central issue of the petition.

REASONS FOR DENYING THE WRIT

The holding of the Ninth Circuit in *Southwest Marine, Inc. v. Campbell Industries,* 732 F.2d 744 (9th Cir. 1984) was limited and entirely consistent with both *PermaLife Mufflers, Inc. v. International Parts Corp.,* 392 U.S. 134 (1968) and *Javelin Corp. v. Uniroyal, Inc.,* 546 F.2d 276 (9th Cir. 1976), *cert. den.,* 431 U.S. 938 (1977).

The Circuit Court made two preliminary findings that led to the ultimate holding. First, Southwest Marine, as a corporate entity, was not at all involved in the formation of the Users' Agreement. Second, Arthur Engel's actions with respect to the Users' Agreement were carried out as the agent of Triple A and not in his individual capacity. *Southwest Marine,* 732 F.2d at 746.

The jury was presented with substantial and uncontroverted evidence that defendant NASSCO originated the concept of Sections 32(b) and (c), and that NASSCO and other defendants interpreted and enforced these sections in a fashion which excluded Respondent from the Graving Dock. (Tr. Vol. IX 1256-1257, Vol. II 232-236, Vol. VIII 1094-1095, Vol. X 1373, Vol. II 222, Vol. VIII 1097) Neither Arthur Engel nor Southwest Marine participated in these acts of interpretation or enforcement which gave rise to the unlawful exclusion and resulting damages.

In sum, Arthur Engel neither actively supported the entire restrictive program, nor did he participate in his individual capacity in the formulation of the scheme or in any capacity to encourage its continuation. The question presented by the Petition is, in fact, not raised by the record on appeal.

In *Southwest Marine,* the Ninth Circuit set aside that portion of the special verdict finding truly complete involvement on the part of Southwest Marine due to insufficient evidence, not because of any change in substantive law. Petitioner pictures Respondent and Arthur Engel as actively supporting the entire scheme, participating in its formulation and encouraging its continuation. This factual picture is utterly refuted by the record, making this the inappropriate case to determine whether such involvement and active participation could bar a plaintiff's cause of action.

THE NINTH CIRCUIT IS IN HARMONY WITH ITS OWN DECISIONS AND RULINGS OF THIS COURT

To encourage private antitrust actions, this Court has refused to recognize the defense of *in pari delicto* in antitrust cases. *PermaLife Mufflers, Inc. v. International Parts Corp.,* 392 U.S. 134, 140 (1968), *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corporation,* 456 U.S. 556, 102 S. Ct. 1935, 1943 n. 6 (1982). The *PermaLife* Court did not decide, however, whether "truly complete involvement and participation in a monopolistic scheme could ever be a basis, wholly apart from the idea of *in pari delicto,* for barring a plaintiff's cause for action." 392 U.S. at 140.

The Ninth Circuit faced this unresolved issue in *Javelin Corp. v. Uniroyal, Inc.,* 546 F.2d 276 (9th Cir. 1976) *cert. den.,* 431 U.S. 938 (1977), holding that a plaintiff is barred from recovery in antitrust only when the illegal conspiracy would not have been formed but for the plaintiff's participation. This test is satisfied where the plaintiff's degree of participation is "equal to that of any defendant and a substantial factor in the formation of the conspiracy." *Id.* at 279.

This Court denied the petition for certiorari arising from *Javelin* in 1977. The limited holding of *Southwest Marine v. Campbell, supra,* is consistent with *Javelin* and does not require substantive review by this Court.

The Ninth Circuit simply found that neither Southwest Marine nor Arthur Engel had either participated to a degree equal to that of any defendant or had been a substantial factor in the formation of the conspiracy.

In suggesting prospective answers to the unanswered question of *PermaLife*, the primary articulated concern of the Court was the fashioning of a rule which would enhance the deterrence of the antitrust laws by providing a positive incentive to bring suit in appropriate cases while avoiding the unjust enrichment of a plaintiff through receipt of profits if the illegal restraint succeeds and treble damages should it fail.

Assuming, as the courts have, that maximization of deterrence outweighs the anomaly of allowing a wrongdoer to recover, the policy objective should be a rule which provides the greatest deterrence benefit while generating the least positive incentive to illegal conduct.

The rule of *Javelin* does this by requiring satisfaction of the dual requirements that the participation of the plaintiff must be both:

1. equal to that of any other defendant; and

2. a substantial factor in the formation of the conspiracy.

That this rule produces the desired policy results may be easily illustrated.

Assume competitors in a given market agree to a scheme which would unreasonably restrict competitive entry into that market. Each of the three co-conspirators participates equally in this formative meeting, and the parties ultimately agree to the restraint. At this point, any determination under *Javelin* is premature. *Javelin* forces the Court to further evaluate the equality of participation in the active

conspiracy — subsequent acts of implementation and encouragement must be evaluated.

Both *PermaLife* and *Javelin* dictate that if one of the employees of the co-conspirators who knows of the scheme through his direct participation in its formulation should withdraw from the conspiracy and voluntarily leave his employment (and his agency relationship) to form a competitive entity which enters the market in question, he should not be barred from bringing suit to terminate the scheme and recover damages arising subsequent to such withdrawal.

In this illustrative example, the prospective plaintiff has not benefited from his participation in the formation of the restraint. He is not one who stands to either benefit from illegal profits if the restraint succeeds or from treble damages if it fails. He is, however, the one most likely, based upon economic incentive, to bring the desirable antitrust action and is in unique possession of evidence which may otherwise go undiscovered, given the invariably covert nature of most unlawful trade restraints.

Under these circumstances, the purposes of the antitrust laws are best served by ensuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws.

The rule of *PermaLife* and *Javelin* operates to attribute fault and deny treble damages only to the plaintiff whose acts have been a proximate cause equal to that of any other defendant of the specific injury for which treble damages are sought. The rule does not enrich a co-conspirator for those damages which it has caused, but does provide a positive economic incentive to a former conspirator to take steps to withdraw from the conspiracy.

Petitioner argues that the Ninth Circuit opinion in *Southwest* permits one who originates, effectuates and encour-

ages the continuation of an antitrust conspiracy to evade the antitrust laws by simply creating an alter ego. The opinion does no such thing.

The damages from which Southwest Marine sought relief all arose from its exclusion from the Graving Dock. This exclusion was proximately caused by the decision of defendants Triple A, NASSCO and Campbell to interpret the Users' Agreement to exclude Southwest, and by these defendants' second, concerted decision to deny Southwest's request to amend the Users' Agreement. These decisions, independent of any participation by either Southwest or Arthur Engel, proximately caused the damages suffered by Southwest.

This ruling is both consistent with *PermaLife* and sound legal and economic policy.

RULING OF OTHER CIRCUITS ARE IN HARMONY WITH JAVELIN AND SOUTHWEST MARINE

Circuits other than the Ninth have also adopted rules under *PermaLife* which consistently require that defendants demonstrate that the plaintiff has willingly participated in the formulation and execution of the scheme and bears equal responsibility for the consequent restraint of trade before the doctrine of "*in pari delicto* plus" may be defensively used.

Petitioner cites several cases from the circuits and argues they are in conflict.

South-East Coal Co. v. Consolidated Coal Co., 434 F.2d 767 (6th Cir. 1970), *cert. den.*, 402 U.S. 980, 91 S. Ct. 1682, is cited as having approved an instruction to the effect the plaintiff could not recover if "equally responsible with defendants in the formation of said conspiracy" and is characterized by Petitioner as emphasizing that "the plain-

tiff's participation must be in the formulation stage of a conspiracy to bar recovery." (Petition for Writ 17)

In fact, the relevant portion of the instruction in question places equal emphasis on initiation and continuous, active participation, expressly stating that even a fully equal participant may recover damages arising subsequent to withdrawal from the conspiracy.[1]

Petitioner further cites *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3 (4th Cir. 1971) as illustrative of the Fourth Circuit's emphasis on participation at the formation stage. In fact the *Columbia Nitrogen* court clearly explained that voluntary formulation and equal participation in the illegality are required to support a finding of *in pari delicto* in antitrust cases. That the as-

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[1]The defendants have entered the defense of "*in pari delicto*" – this means that the defendants say that if an unlawful conspiracy existed, plaintiff was equally responsible with defendants in the formation of said conspiracy. Under this defense, the Court charges you that *if the plaintiff was a co-initiator of the conspiracy and equally responsible therefor, plaintiff is not entitled to recover damages for that period of time that the plaintiff remained a party to the conspiracy.*

"Now, a person may be a party to such an arrangement, be '*in pari delicto*,' but he can withdraw from that. You are not once brushed with tar that you can't get rid of.

"So, even though you may believe that he did do this, that he was in this arrangement, entered into this contract for the purpose of putting other operators out of business, *yet if you believe that he withdrew from and he got out of it and if you find that the defendants were more responsible than the plaintiff for the formation of the conspiracy, plaintiff may recover*, even though it was a party to the conspiracy, even though South-East Coal Company was a party to the conspiracy. Even though you may find that plaintiff was a party to the conspiracy and if you find that plaintiff withdrew from the conspiracy and sought to avoid the effects of the conspiracy, it may recover damages arising in the period of the case subsequent to such withdrawal." 434 F.2d at 784. [Emphasis added]

serted defense requires both mutual participating in the formulation and execution of the scheme and equal responsibility for the consequent restraint of trade was more recently underscored in *Burlington Industries v. Milliken & Co.*, 690 F.2d 380, 387 (4th Cir. 1982), *cert. den.*, 103 S. Ct. 1893, 1983.

> Columbia's counterclaim is the type of case the Court [in *PermaLife*] expressly excluded from the scope of its opinion. Separate opinions in *PermaLife* representing the views of five of the members of the Court, however, provide guidance for the resolution of this issue. These opinions teach that when parties of substantially equal economic strength mutually participate in the formulation and execution of the scheme *and bear equal responsibility for the consequent restraint of trade, each is barred from seeking treble damages from the other.*
>
> We think it plain, therefore, that a party, who *voluntarily formulates and equally participates in* a noncoercive agreement for reciprocal dealing until a declining market makes its purchases unprofitable, cannot maintain an action under Section 1 of the Sherman Act against its trading partner. 451 F.2d at 15-16. [Emphasis added]

Other opinions of the circuit courts cited by Petitioner are easily reconciled with *PermaLife, Javelin* and *Southwest.*

The Petitioner cites pure dictum from the Fifth Circuit in *Greene v. General Foods,* 517 F.2d 635 (5th Cir. 1975) which has not been translated into any holding of that court in the intervening nine years yet ignores the later holding of *Abraham Construction v. Texas Industries, Inc.*, 604 F.2d 897, 902 (5th Cir. 1979) which attempts to recon-

cile the post-PermaLife holdings of the Second, Fourth, Seventh and Ninth Circuits.

Driebus v. Wilson, 529 F.2d 170 (9th Cir. 1970) was a shareholders derivative action for damages under Sections 1 and 2 of the Sherman Act, 15 U.S.C. Sections 1 and 2. The Ninth Circuit properly dismissed the action where, on the face of the complaint, it appeared that the plaintiffs were the originating, active persons responsible for the establishment of the very injury which was the focus of the action — the proximate cause of their own injury. Such a holding is entirely consistent with *PermaLife, Javelin* and *Southwest.*

In *Kastenbaum v. Falstaff Brewing Co.,* 514 F.2d 690, 695 (5th Cir. 1970), the Fifth Circuit reversed the jury verdict favoring the plaintiff for failures in proof. *Perma Life* was affirmatively cited by the plaintiff as authority for the proposition that he had the right to recover all costs incurred in price fixing promotions regardless of whether he was compelled to participate or participated voluntarily. The Fifth Circuit disagreed, citing that portion of Justice Black's opinion in *PermaLife* permitting consideration of active participation in computing damages. Again, this holding is in harmony with *PermaLife, Javelin* and *Southwest.*

Lastly, Petitioner cites *Premier Electrical Construction Co. v. Miller-Davis Co.,* 422 F.2d 1132 (7th Cir. 1970). The Seventh Circuit reversed the district court's award of summary judgment on the issue of *in pari delicto,* and remanded for a factual inquiry into whether there existed relative bargaining power between the parties, whether the plaintiff was forced by economic pressure to enter into the agreement and whether the plaintiff had initiated any provision of the agreement at issue. The holding of the court, that *PermaLife* dictates that plaintiffs who do not bear equal

responsibility for creating and establishing an illegal scheme or are forced by economic pressures into such a role are not barred from recovery, is clearly consistent with *PermaLife*.

The Eighth Circuit, not discussed by Petitioner, expressly adopted the *Javelin* test in *International Travel, Etc. v. Western Airlines, Inc.*, 623 F.2d 1255, 1262 n. 10 (8th Cir.), *cert. denied*, 449 U.S. 1063 (1980).

The Tenth Circuit has also reconciled the "conflict" between the circuits. *Lamp Liquors, Inc. v. Adolph Coors Co.*, 563 F.2d 425, 431 (10th Cir. 1977), citing *Javelin*, *Greene*, and *Premier Electrical*, *supra*, as similar interpretations of *PermaLife*.

CONCLUSION

The unresolved question raised in the *PermaLife* opinion is not raised by this record. The opinion of the Ninth Circuit in *Southwest Marine* is based upon the legal issue of agency and not a substantive re-examination of the rule of *PermaLife*. The circuits are not in conflict. In fact, over time they have and are continuing to forge a consensus rule on the issue which is a proper function of the circuit system.

For the reasons set forth above, the Petition should be denied.

Respectfully Submitted,

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